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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 853

FEDERAL TRADE COMMISSION,

Petitioner

v.

COLUMBIA BROADCASTING SYSTEM, INC. AND COLUMBIA RECORD CLUB, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

The Questions posed by the petition for certiorari are more precisely stated as follows:

1. Whether the Court of Appeals, having rejected the underlying legal and factual bases for an order of the Federal Trade Commission ("Commission"), abused its equity and statutory jurisdiction in directing the Commission, on remand, to take additional evidence with respect to the structure of the relevant market and to determine whether supplies of records have been foreclosed from other record clubs and whether such

foreclosure has significantly prevented new entrants into that market.

2. Whether this Court should now consider on the merits the decision of the Commission in the face of the determination of the Court below that the Commission's cease and desist order rested on an insufficient analysis of the market structure, an erroneous theory of illegality, an untrue basic factual assumption and a totally stale record.

3. Whether certiorari should be granted when there is a serious and newly discovered issue of a suppression of evidence by the Government.

STATUTE INVOLVED

The petition adequately identifies the statute upon which the Commission asserted illegality (Pet. 2-3).*

STATEMENT

Since 1938 Columbia Broadcasting System, Inc. ("Columbia") has manufactured and sold phonograph records to record distributors and retail dealers for resale to consumers. Prior to World War II, there were only a handful of such record manufacturers, and industry sales had been in a state of decline for over two decades (J. A. 36-7).** The introduction by Columbia of the inexpensive, lightweight, non-breakable long playing record ("LP") in 1948 revolutionized the record industry and facilitated the entry of hundreds of new record manufacturers (J. A. 37-8, 48-9). These new small companies were innovative,

*The Solicitor General's Petition is abbreviated "Pet."

**References designated "J. A." are to pages of the Joint Appendix below. J. A. citations herein are primarily to the findings of fact of the Hearing Examiner—findings which are virtually uncontradicted in the record.

attracted new artists, helped to promote and pioneer the many new emerging trends in music (J. A. 49-50, 53-4), and by 1962 had achieved 62.2% of retail store sales (RX 428, p. 15a, *infra*).*

In 1955, Columbia formed the Columbia Record Club ("Club") to sell its records to club members by mail (J. A. 63-6). Thereafter, Radio Corporation of America ("RCA"), Capitol Records, Inc. ("Capitol"), Readers Digest, Book-of-the-Month Club and others organized competitive record clubs and mail order sales organizations (J. A. 77-82, 297, 308-311, 317-9).

The Club achieved an early competitive lead as a result of its willingness to pioneer a new method of record distribution in the face of expected opposition from traditional retail dealers (J. A. 295-6). However, Columbia's retail record catalog proved to be deficient in many areas of musical interest important to Club members (J. A. 116-27). Members expressed their dissatisfaction with the limited selection offered them by dropping their membership and ceasing to buy records (J. A. 121-2, 126-7).

In order to enlarge its selection of artists and repertoire, the Club over a period of some four years, entered into manufacturing licenses with a few of the newly emerged record companies ("outside labels") (J. A. 82, 110, 121, 123).** The outside labels, each of which was a small company, received firm guarantees of sales, extensive nationwide advertising and promotion, and substantial

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*"RX" references are to Respondents' Exhibits below.

**These companies, denied access to the facilities of the RCA and Capitol clubs (J. A. 297, 832, 848-9, 1167, 1429, 1512-3), avidly desired club distribution for their artists and for themselves (J. A. 107-8, 111, 277-8). Such distribution promised them additional revenues to supplement revenues from retail sales (J. A. 277-8, 1510-11, 1631-2, 904, 1427, 1429), as well as advertising and promotion in national magazines which they could not afford (J. A. 54, 277, 322-3). They lacked the desire, catalog, facilities, funds and know-how to enter the club business on their own (J. A. 105-6).

royalties based on sales.* In return, the Club received the exclusive right to manufacture and sell the outside label records to Club members for short periods of time ranging from one to about three years (J. A. 108-110, 277).**

In 1959, the Federal Trade Commission commenced the investigation which resulted in the filing of its complaint herein in June 1962. The complaint was mainly directed to the legality of the outside label agreements (J. A. 9-18). However, at the trial, the outside label issue was virtually ignored (J. A. 248-9).*** Instead, the Commission staff called a host of record dealers and other witnesses who charged that record clubs, by their advertising and low pricing, diverted sales from traditional retail dealers. Commission counsel asked the Examiner to condemn the licensing agreements because they had "aggravated" an injury which record clubs had allegedly inflicted on retail dealers.****

The Hearing Examiner on September 30, 1964 dismissed the complaint, and issued an exhaustive 332 page Initial Decision, consisting primarily of detailed findings of fact supported by voluminous record citations. He found that the record industry was highly volatile and highly

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*As of the date of the complaint, the Club had catalog contracts with only six out of the more than several hundred new record companies. Each of the licensors controlled at most about 1% to 2% of total LP sales in record stores. All together, these companies accounted for only about 7% of total LP sales in record stores (J. A. 110, 294; See year-to-date figures for Mercury, Kapp, Liberty, United Artists and Parkway on RX 311, pp. 4A, 4B, pp. 16a, 17a, *infra*.).

**Contrary to the assertion of the Solicitor General, the licensing agreements were not "regularly renewed" (Pet. 5), as Commission counsel conceded on the appeal.

***The trial lasted almost nine months. These were more than 160 witnesses, 11,000 pages of transcript and 1,400 exhibits.

****Conclusions, Argument, Proposed Order, Vol. II, p. 337 and table on dealer injury Appendix A, pp. i to xix, pp. 18a-37a, *infra*.

competitive, that record clubs had not injured retailers, and that the practices challenged in the complaint had not hampered the growth of record clubs (J. A. 36-52, 247-9, 294-7).

Commission counsel appealed, still contending that the outside label agreements should be invalidated because they had resulted in injury to retail dealers (J. A. 2096, 2100). The appeal was argued in May, 1965, but the decision thereon was delayed for two years and two months.*

In July, 1967, the Commission reversed the Examiner's Initial Decision, Commissioner Elman not concurring. The Commission concluded that there was insufficient evidence to support any findings of dealer injury and also that the licensing agreements had not prevented other record clubs from selling outside label records since they were readily available to all such clubs on the open market (Pet. 52a, n. 70; 58a-59a).** However, the Commission advanced the totally new contention that the licensing agreements enabled Columbia to procure the outside label records at a favorable cost "differential" which in turn barred the entry of competitive record clubs (Pet. 49a-55a, 57a-59a, 72a-73a, 76a, 81a-83a). The Commission issued a drastic cease and desist order barring the Club from maintaining any exclusive licensing agreements regardless of the business purpose, importance, terms, or duration of such agree-

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*During this lengthy hiatus, a competitive record club, Record Club of America ("RCOA") sought to intervene in these proceedings. The significance of this attempted intervention is discussed *infra* at pp. 10-11, 16-20.

**The trial record disclosed, and RCOA's intervention confirmed (J. A. 478), that the various independent record clubs at all times offered the records of all labels, including Columbia, RCA, Capitol and Columbia's outside labels. There was no evidence that "the Big Three did not supply competing clubs" through their distributors (Pet. 6, n. 7) and there was no support in the record for the Commission's finding—now reiterated by the Solicitor General (Pet. 10, n. 10)—that "60% of the record sales market is foreclosed from new club entrants".

ments. The Commission's order also barred enforcement of certain contractual provisions in the early Club agreements which related to the payment of artists' royalties—provisions which had been abandoned by Columbia in 1962 (Pet. 73a-75a).

Respondents filed a petition for review (J. A. 557-62).* On June 26, 1969, the Court of Appeals for the Seventh Circuit affirmed only that part of the Commission's cease and desist order which related to the peripheral artists' royalties issue. The Court vacated the balance of the Commission's order because of fundamental defects in the legal and factual bases underlying the Commission's decision. The case was remanded to the Commission which was directed to consider further the structure of the record club market in order to determine whether supplies of records had in fact been foreclosed from other record clubs and whether this foreclosure had significantly prevented new club entrants (Pet. 13a-15a, 19a-20a).

REASONS FOR DENIAL OF THE PETITION FOR CERTIORARI

This case presents no issue of general significance under the antitrust laws. There is no claim of any conflict of decisions between the circuits.

The order of the Court of Appeals followed logically from its inability to accept the bases articulated by the Commission in support of its order. The Court's order was an appropriate exercise of its equitable and statutory jurisdic-

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*The petition for review challenged the Commission's basic fact finding and contended that the substituted findings were directly contrary to the findings of the Hearing Examiner and were not supported by the record (J. A. 558-61). In the light of the disposition it made of the case, the Court of Appeals did not feel it necessary to pass on the bulk of those specific challenges.

tion in the light of the particular facts of this case and was not a departure from settled principles of law.

Furthermore, there is present here a serious issue of suppression of evidence which should also be considered on remand and which constitutes an independent ground for denying certiorari.

I

THE PETITION SEEKS REVIEW OF AN ABSTRACT ISSUE WHICH IS NOT PRESENTED BY THE DECISION BELOW.

The petition for certiorari is based on a patently incorrect assumption—the assumption that the Court of Appeals sustained the Commission's decision on the merits but nonetheless ordered a remand to take additional evidence. This simply is not the case. Nowhere in its decision did the Court below find that respondents' licensing practices violated Section 5 of the Federal Trade Commission Act or justified the issuance of a broad cease and desist order prohibiting all exclusive supply agreements.

It is well-settled that an administrative order may be sustained only on the precise legal and factual bases articulated by the agency itself in support of its order. *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947); *Burlington Truck Lines* v. *U. S.*, 371 U. S. 156, 167-9 (1962). Here the Court below squarely rejected the principal legal and factual bases articulated by the Commission in support of its order:

> A. The Commission had flatly stated that "the most clearly appropriate legal standards by which to judge the legality of the conduct involved are those expressed in the Supreme Court's recent merger decisions, particularly those involving the so-called 'horizontal' com-

binations" (Pet. 85a-86a). Failing even to cite the long line of cases sustaining the validity of short-term exclusive supply agreements, the Commission rested its decision squarely on *U. S.* v. *Philadelphia National Bank*, 374 U. S. 321 (1963), and comparable decisions (Pet. 85a-87a). The Court of Appeals held that the Commisision's horizontal merger law theory was "not in tune with the reality of the situation", leading the Commission to underemphasize a critical antitrust factor (Pet. 11a);

B. The Commission conceded that the licensing agreements did not foreclose club competitors from access to the licensors' records, as the complaint had alleged. Instead, the Commission, for the first time in these lengthy proceedings, substituted the charge that the licensing agreements had created a "price differential" which caused competitors to pay more for their records and barred the entry of new record clubs, all in violation of the "price discrimination law" (Pet. 85-86a, n. 142). The Court did not adopt the Commission's afterthought Robinson-Patman Act legal rationale and, furthermore, characterized the basic "price differential" theory as a mere "assumption" which "does not seem to be true" (Pet. 14a);

C. Building on patently incorrect legal and factual assumptions, the Commission had concluded that the cost " 'handicap' " allegedly imposed on potential club entrants by the licensing agreements "obviously affected the structure of the club market" (Pet. 82a-83a). Aware that the Commission's decision ignored the significant entry of other record clubs as well as the increased share of sales which such clubs had achieved, the Court below discreetly noted that the Commission had "failed

sufficiently to examine the market-structure" (Pet. 13a-14a)*.

Having thus rejected the legal and factual underpinning of the Commission's order, it would have been entirely appropriate for the Court of Appeals to have simply set aside the Commission's decision. 15 U. S. C. § 45(c). The Commission would then presumably have had an opportunity, on its own initiative, to cure the defects in its order by taking new evidence and making additional findings. See 15 U. S. C. § 45(i). Instead, the Court, as it was clearly authorized to do, made explicit the respects in which the Commission's decision was defective and set forth the substantive issues which should be considered and resolved on remand. To impute any more than this to the Court's decision—as the Government now seeks to do—is to distort what the Court actually decided.

The Government's attempt to extract a substantive issue from the Court's remand instruction is a subtle effort to obtain a premature review of the Court's non-final decision on the merits. This Court has often said that it will

*The Solicitor General's claim that the Court below had affirmed the Commission's decision appears to rest exclusively on the bare-bones statement that the licensing agreements had "foreclosed a share of the market" (Pet. 10)—a market which, incidentally, the Commission had "failed sufficiently to examine". Professor Turner has noted that there are many "obscurities concerning the meaning of foreclosure". Kaysen and Turner, *Antitrust Policy* (1959), p. 14. It is abundantly clear, however, that "foreclosure" is not synonymous in antitrust with "illegality". If it were, then "limited term exclusive dealing" contracts, which obviously "foreclose", could never survive, even though this Court has noted that they are not "inherently anti-competitive". *Brown Shoe Co.* v. *U. S.*, 370 U. S. 294, 330 (1962).

Economists recognize that "competition is simply 'getting the business'; every sale *forecloses* competition, and business could not go on without continuous *foreclosure* of this type. An exclusive arrangement is simply 'getting the business' for a period of time. It follows that an exclusive arrangement may serve to promote competition, rather than discourage it". Hale & Hale, *Market Power: Size and Shape in the Antitrust Laws* (1958) pp. 50-51. (emphasis added)

not review abstract issues and questions not clearly presented by the record. See e.g. *Oliphant* v. *Brotherhood of Locomotive Firemen,* 359 U. S. 935 (1959). On that principle, certiorari should be denied here.

II

IT IS WELL SETTLED THAT THE COURT OF APPEALS HAD EQUITABLE AND STATUTORY JURISDICTION TO ORDER THE TAKING OF ADDITIONAL TESTIMONY.

Assuming *arguendo* (and contrary to fact) that the Court had been able to accept the legal and factual bases for the Commission's order, it could have affirmed that order only if it were appropriate for present enforcement. *Burlington Truck Lines* v. *U. S., supra* at 172; *NLRB* v. *Jones & Laughlin Co.,* 331 U. S. 416, 428 (1947); *Ford Motor Co.* v. *NLRB,* 305 U. S. 364, 373-4 (1939). The 1967 Commission order was admittedly based on a nine year old factual record (Pet. 4), the Commission having ignored statistical data for subsequent years which was inconsistent with its conclusions. In addition, there were continued dramatic changes of circumstances which were occurring in the market place largely during the course of the Commission's inordinate delay of two years and two months in deciding this case (Pet. 14a).

The Solicitor General does not deny the materiality of these changed circumstances. Among them were the significant entry into the market of other record clubs—a development which, according to the Commission's cost differential theory, could not happen.* For example, the intervention petition filed in February 1967 by RCOA, a

*In addition to the entry of other record clubs, substantial changes had occurred in the entire record industry. Consumer taste had undergone a substantial change and many of the new recording stars were recording for small companies (Pet. 14a).

competitive record club, showed on its face that RCOA had 700,000 members and annual sales of $8 million (J. A. 466-9). By comparing these statistics with the figures in the trial record, the Commission knew in 1967 that RCOA was the second largest record club in the country, a fact which the RCOA President was to confirm in testimony before Congress in April, 1967 (Pet. 6a, 14a).*

The Commission in its July, 1967 decision concluded that RCOA had "no competitive significance", ostensibly because the parties had opposed RCOA's formal intervention petition (Pet. 69a, n. 111).** Although it could have calculated from its own litigation files that RCOA in 1967 had 70 times more members and 16 times more sales than the Diners' Record Club, the Commission nonetheless chose to characterize Diners' as the one "serious" new record club entrant since 1958 (Pet. 69a). This was a clear example of how the Commission "failed sufficiently to examine the market structure", and the Court below recognized this by specifically referring to RCOA in directing a remand.

It would have been entirely appropriate, as a matter of law, for the Court below to have considered changed circumstances which arose *after* the order of the Commission

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*Hearings on S. 597 before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., pt 3, at 787 and 792 (1967). The entry of still other record clubs was duly reported in the post-trial trade press. The Commission must have known about this because in its findings it cited the post-trial trade press for other purposes. (Pet. 57a, n. 80; 58a, n. 81; 69a, n. 111).

**Respondents had opposed RCOA's intervention because it was directed to placing into the record at the last moment inaccurate information concerning the post-trial licensing policies of other record clubs. Respondents did not denigrate the competitive significance of RCOA's entry but rather advised the Commission that this serious new entry had not been thwarted by the existence of licensing agreements (J. A. 472-7). Commission counsel's opposition to the intervention was, as we will show *infra* at pp. 16-20, accompanied by a suppression of evidence relating to the earlier competitive success of RCOA.

had been entered. See *NLRB* v. *Jones & Laughlin Steel Corp., supra* at 427-8; *U. S.* v. *Aluminum Company of America,* 148 F. 2d 416, 445 (2nd Cir. 1945); *American Chain & Cable Co.* v. *FTC,* 142 F. 2d 909 (4th Cir. 1944); *Fleming* v. *FCC,* 225 F. 2d 523 (D. C. Cir. 1955).* Surely it could so find where the additional and significant changes were occurring while the case was still *sub judice* before the Commission and with the full knowledge of the Commission.**

A reviewing court has authority to remand when, as here, circumstances arise "which may affect the propriety of enforcement" of an administrative order. *NLRB* v. *Jones & Laughlin Steel Corp., supra* at 428. A remand order is appropriate to bring a record "up to date to take account of supervening events" where, as here, that record was "stale". *American Committee for Protection of Foreign Born* v. *SACB,* 380 U. S. 503, 505 (1965); *Veterans*

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*The Solicitor General obliquely seeks to distinguish a whole line of FCC cases where remands were directed because of changed circumstances (Pet. 17, n. 11). In fact, the FCC cases closely parallel the situation here. See particularly *WORZ, Inc.* v. *FCC,* 345 F. 2d 85 (D. C. Cir., 1965) involving, as here, a subsequent "change in character of [the] community" (Pet. 17, n. 11) and *Fleming* v. *FCC supra,* involving, as here, a change in the facts on which the Commission had conditioned its order.

**The Court below also cited the Commission's "long delay" in deciding this case (Pet. 14a). While the Solicitor General suggests that long delays are inherent in the Commission's performance of its functions (Pet. 15), the American Bar Association's Commission to Study the Federal Trade Commission cited this very case for the proposition that "some of the most notorious examples of protracted administrative proceedings" have occurred at the Commission. Report of the ABA Commission to Study the Federal Trade Commission (1969), page 28. Furthermore, here the long delay was used to redraw the complaint (by injecting new theories of horizontal merger and price discrimination law) and to rewrite the trial record (by making it appear that the real issue at the trial was injury to record clubs rather than injury to retail dealers)—clearly improper actions by the Commission. *See Rodale Press, Inc.* v. *FTC,* 407 F. 2d 1252 (D. C. Cir., 1968).

of the American Lincoln Brigade v. *SACB,* 380 U. S. 513 (1965).* In addition to the Court's general jurisdiction to direct a remand, the Federal Trade Commission Act contains a provision (15 U. S. C. § 45(c)) which specifically authorizes the reviewing court to remand for the taking of additional material evidence.

This Court has observed that in Federal Trade Commission Act cases, it is "familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied." *Ford Motor Company* v. *NLRB, supra* at 373. The Commission was directed by the Court below to supply those defects in the record by determining whether "supplies of records have been foreclosed from other clubs and whether such foreclosure has significantly prevented new entrants into the market". (Pet. 14a)

This Court has said that it will not reverse a remand order unless the remand was "arbitrary or unreasonable" or constituted an "abuse of discretion". *NLRB* v. *Indiana*

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*The Solicitor General's effort to distinguish the *SACB* cases is unpersuasive. He argues that the issue there depended on the "present effect" of the practices involved, whereas a Commission order depends on a judgment as to "probable future effect" (Pet. 15-16). The distinction is manifestly incorrect. This Court specifically noted that a "registration order", just like a cease and desist order, "operates prospectively". *American Committee for Protection of Foreign Born* v. *SACB, supra* at 505. Moreover, no authority is cited to support the proposition that cases involving only a statutory question may be decided on a stale record, whereas cases containing constitutional issues may not be.

& Michigan Electric Co., 318 U. S. 9, 16, 30 (1943). The Solicitor General makes no such showing here.*

III

THE COURT'S DISPOSITION OF THE CASE DID NOT CONSTITUTE A DEPARTURE FROM SETTLED APPELLATE PRACTICE.

Despite the plethora of cases cited above, the Solicitor General maintains that the remand order was a departure from settled appellate practice (Pet. 11). He relies exclusively on a handful of cases arising under the Interstate Commerce Act, most particularly *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503 (1944). Those cases are totally inapposite and do not support interference with the disposition of this case below.

Jersey City arose within the particular statutory scheme governing the powers of the Interstate Commerce Commission. The sole issue there was whether, when the I. C. C.

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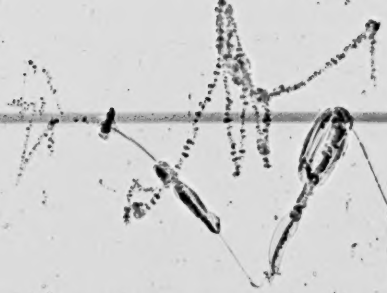
*The Solicitor General contends that the Court below lost its equitable and statutory right to remand because respondents had not formally moved to reopen the record below (Pet. 14). No legal authority is cited in support of that position. Furthermore, the factual and legal posture of the case at any relevant stage was such that such a motion was unnecessary and would have been futile.

Since the trial record clearly showed the entry of many new record clubs and that their share of sales had grown four-fold between 1959 and 1961 (J. A. 113, 297), it was unnecessary between 1964 and February 1967 to move to reopen to show that still other clubs had entered and that the Hearing Examiner had been correct in concluding that the licensing agreements had not barred entry.

In February 1967, the RCOA intervention petition, and respondents' opposition thereto, put the Commission on direct notice of the seriousness of RCOA's new entry; no motion to reopen was necessary to show the Commission what already appeared in its own files.

After July 1967, it would have been futile to move to reopen because the Commission had prejudged the issue by incorrectly characterizing RCOA, the second largest record club, as having "no competitive significance" and by ignoring the other new entrants reported by the trade press.



refused to reopen hearings completely, a district court could enjoin enforcement of a rate order, in the absence of an abuse of discretion on the part of that Commission. Here, the issue does not concern the power of the Commission to reopen but rather the power of the reviewing Court of Appeals to remand the cause for the taking of additional evidence. As this Court has noted, "The language of the [FTC] statute is broad and confers power of review not found in the Interstate Commerce Act." *FTC* v. *Curtis Publishing Co.*, 260 U. S. 568, 580 (1923).*

In the final analysis, the decision of the Court of Appeals below did not involve an application of any new or convoluted theories of antitrust law, was not a final order, and, accordingly, "is not yet ripe for review by this Court". *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U. S. 327, 328 (1967). See also *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258 (1916). Far from a "departure" from accepted principles, the action of the Court below, based solely on the peculiar facts of this case,** was a proper and normal exercise of the Court's equitable and statutory jurisdiction.

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*49 U. S. C. § 15(2) provides that rate orders of the ICC shall be self-executing within a reasonable time, unless "the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction." The Commission alone is empowered to "modify", and the power of the reviewing court is limited to granting or denying an injunction of the order below. 15 U. S. C. § 45(c), on the other hand, envisions a far broader role for the reviewing court. The power of the Court is not limited to "suspending" or "setting aside", but it

> "shall have power to make and enter a decree affirming, *modifying*, or setting aside the order of the Commission."

**This Court should not depart from "the rule long observed" and review a judgment below which "depended essentially upon an appreciation of the evidence". *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440, 441 (1918). Granting of certiorari is not "warranted merely to review the evidence or inferences drawn from it". *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 179 (1938).

IV

CERTIORARI SHOULD BE DENIED IN ORDER TO PERMIT CONSIDERATION OF A NEW ISSUE OF SUPPRESSION OF EVIDENCE BY THE GOVERNMENT.

Shortly after the decision of the Court of Appeals in this case in June, 1969, CBS counsel received in writing certain information which suggested the possibility that there may have been a suppression of evidence by the Government while this case was *sub judice* before the Commission and, further, that there may also have been a material misrepresentation of fact by Government counsel upon which the Commission subsequently relied to the detriment of CBS. The alleged suppression and misrepresentation related to the early highly successful entry into the club field of RCOA, the existence of which had not been formally disclosed on this record until February, 1967 (*supra* at pp. 10-11). If such a suppression occurred, it would have thoroughly tainted the Commission's July, 1967 decision and order which the Solicitor General now seeks to affirm.

CBS counsel immediately presented the available information to the General Counsel's Office of the Commission with a request that there be an immediate and thorough investigation. It was particularly suggested that the Commission obtain certain evidence from Lewis Markowitz, RCOA's former General Counsel, with respect to a meeting between RCOA representatives and Commission trial counsel.*

The subject matter of the CBS request related to what has now turned out to be a vital issue in this case. Consistent

*After the decision of the Commission in July, 1967, RCOA had commenced an action against CBS and others in the United States District Court for the Eastern District of Pennsylvania. The information relayed to the General Counsel's office was developed in the discovery in that case.

with their contention that the real thrust of this case was retail dealer injury, the Government prosecutors had offered little evidence at trial as to the existence and successful entry of record clubs other than what they called the "Big Three". Instead, they repeatedly suggested on the record that, except for the so-called Diners' Record Club, they had no knowledge about any other independent record clubs (e.g. J. A. 2090; Tr. 5998-9, 6015, pp. 38a-39a, *infra.*)* At the oral argument of the appeal in May, 1965, Commissioner Elman asked the Government prosecutors about the existence of other record clubs that "sell you anything" out of the industry-known Schwann LP catalog. Obviously, under the impression that such clubs did exist, Commissioner Elman asked where such clubs obtained their records. Government counsel answered as follows:

> "The record is barren about non-Big Three record clubs, *and we don't know anything about them. The only record club that we know anything about besides the Big Three is the Diners Record Club.*" (J. A. 2099) (Emphasis added.)

Consistent with these representations, the Commission later found that except for Columbia, RCA and Capitol, the only other "serious attempt at entry" had been made by the Diners' Record Club (Pet. 69a-70a).**

Subsequent to the decision of the Court of Appeals in this case, Lewis Markowitz, an experienced trial lawyer, appeared as a witness under subpoena in the RCOA case

*"Tr." references are to the Trial Transcript.

**The Commission's finding as to the Diners' Record Club ignored the successful entry of RCOA and others, and was based solely on the testimony of 1 witness out of some 160—a witness whom the Examiner found could not be "credited" and who had been "contradicted by contemporaneous documents from his own files and by virtually every witness who had crossed his path" (J. A. 297-8). Compare *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, 496-7 (1951).

against CBS. His testimony disclosed that the representation made by the Government prosecutors on the argument of the appeal was manifestly incorrect.

Markowitz had been counsel, secretary, and a director of RCOA. He testified that he and the President of RCOA had conferred with Government trial counsel at the Federal Trade Commission's offices in Washington and had there disclosed the history and competitive success of RCOA. Specifically, Government counsel were advised that RCOA was then the fourth largest record club in the country, if not the third largest. Mr. Markowitz made it clear in his testimony (pp. 4a, 6a-11a, *infra*), as he had stated in a prior letter to the present counsel for RCOA (pp. 13a-14a, *infra*), that this important meeting occurred within 60 to 90 days after the Hearing Examiner's decision of September 30, 1964 and, in any event, well *before* the oral argument of the appeal before the Commission on May 13, 1965.* The information conveyed to Government counsel at this meeting indicated that RCOA had made a "successful" and "significant" entry during the very period when Government counsel were representing on the record that it had not happened and could not happen. The facts of this meeting were not disclosed to the Commission prior to the July, 1967 decision.

RCOA's significant market entry and penetration was undoubtedly material evidence. If disclosure of these facts was made by RCOA to Government counsel prior to May, 1965 (as the Markowitz testimony establishes), then there was a suppression of evidence and a material mis-

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*The office of the Commission's General Counsel, after an investigation conducted during the summer of 1969, admits that such a meeting occurred. However, it contends that the meeting took place in October, 1965, a few months after the oral argument of the appeal.

representation of fact to the Commission at the oral argument of the appeal. Even if the disclosure occurred in October, 1965, there was nonetheless a suppression of this evidence and a failure to correct what might then have been an inadvertent misrepresentation of fact at the oral argument of the appeal. In either event, it is clear that the facts as to RCOA's significant market penetration directly and dramatically confirmed the findings of the Hearing Examiner that exclusive licensing agreements had not barred competitive entry.

There was ample opportunity to correct the record. In opposing RCOA's intervention in February, 1967, respondents' counsel had called attention to what appeared to be RCOA's belated "debut" in this case (J. A. 474) and to the representation which Government counsel had made to Commissioner Elman (J. A. 476). Government counsel had observed that RCOA's intervention was "untimely" (J. A. 470), but they never disclosed that this was not RCOA's "debut" in this case and that RCOA's successful market penetration had been fully disclosed to them two or three years earlier.*

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*At this late date, all of the consequences of the suppression cannot be fully known. It is conceivable that if the Commission had been promptly apprised of the facts in 1964 (or 1965), it might have forthwith affirmed its Hearing Examiner instead of utilizing two years and two months to find illegality because of its misapprehensions as to the market structure. It is conceivable that if the Commission knew about RCOA's enormous growth rate between 1964 (or 1965) and February, 1967, it would not have concluded in July 1967 that RCOA had "no competitive significance" and would thus not have found that the licensing agreements barred competitive entry. Finally, if the Commission had any doubt about its ability to square the facts of RCOA's significant market entry with its new theory of a serious cost differential which allegedly barred such entry, it could have remanded on its own initiative in 1964 or 1965 without producing any undue delay. All of these options were foreclosed by the continued silence of the Government prosecutors.

If this were a criminal prosecution, whether antitrust or otherwise, the applicable decisions of this Court would require the granting of a new trial.* We know of no authority which suggests that the Government prosecutor's duty of full disclosure, fairness and candor is any less in a federal administrative proceeding which, by statute, is reviewable in the Federal courts. In supervising federal administrative proceedings, this Court has stated that it is charged with imposing a "fastidious regard for the honor of the administration of justice". *Communist Party of the U. S.* v. *SACB,* 351 U. S. 115, 124 (1956). See also *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, 225 (1946).**

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*Suppression of evidence constitutes a violation of due process of law. *Mooney* v. *Holohan,* 294 U. S. 103 (1935). It does not matter whether the suppression is wilful or negligent. *U. S.* v. *Consolidated Laundries Corp.,* 291 F. 2d 563 (2nd Cir., 1961). Whether by carelessness or design, the prosecutor may not make false or incorrect representations to the Court or to defense counsel. *Townsend* v. *Burke,* 334 U. S. 736, 741 (1948). He may not permit false or incorrect statements to go uncorrected. *Alcorta* v. *Texas,* 355 U. S. 28 (1957). He may not withhold evidence that would tend to collapse his case. *U. S. ex rel Montgomery* v. *Ragen,* 86 F. Supp. 382, 386-7 (N. D. Ill., 1949).

**While it is unusual to raise an issue of suppression of evidence for the first time in the Supreme Court, the facts here were not embodied in any reliable and admissible form until after the decision of the Court of Appeals. It was an issue which could not have been raised before. *NLRB* v. *Jones & Laughlin Co., supra* at 427. In at least one instance, the Solicitor General himself raised the issue for the first time in this Court. *Mesarosh* v. *U. S.,* 352 U. S. 1 (1956). This Court has firmly indicated that it will not, in such a case, determine the issues on the merits. *Communist Party of the U. S.* v. *SACB, supra.*

CONCLUSION

For all of the reasons hereinabove set forth, the petition should be denied.

Respectfully submitted,

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Of Counsel.

January 16, 1970

APPENDIX

Deposition of L. H. Markowitz in Record Club of America, Inc. v. Columbia Broadcasting System, Inc. et. al., United States District Court, Eastern District of Pennsylvania

York, Pa.
September 5, 1969

[3] *Examination by Mr. Sokolow*:

Q. Mr. Markowitz, you are an attorney, is that correct? A. Yes, I am.

[4] Q. Will you state for the record the name of your firm? A. Markowitz, Kagán & Griffith, Esqs., 141 East Market Street, York, Pennsylvania.

Q. Did you or your firm have a business relationship over a period of time with a client by the name of Record Club of America? A. We did.

Q. And, what was that relationship? A. We were attorneys for the firm.

Q. Over what period of time, Mr. Markowitz? A. From the inception of the founding of Record Club of America until approximately December 1, 1967.

* * *

[7] *By Mr. Sokolow*:

Q. In addition to being an attorney for the Record Club of America, Mr. Markowitz, were you an officer of the company? A. I was.

Q. What office did you hold? A. Secretary.

* * *

[8] *By Mr. Sokolow*:

Q. In addition to serving as attorney and as secretary, did you hold any other position with the company during the period that you described? A. I was a member of the board of directors.

* * *

Deposition of L. H. Markowitz in Record Club of America, Inc. v. Columbia Broadcasting System, Inc. et al., United States District Court, Eastern District of Pennsylvania

[21] *By Mr. Sokolow:*

Q. Mr. Markowitz, did you have a meeting with Mr. Needleman and Mr. Levin [sic] of the Federal Trade Commission? A. Yes.

* * *

[28] *By Mr. Sokolow:*

Q. Do you know a Mr. Robert Horner?

Mr. Shuman: Whom are you addressing that question to?

By Mr. Sokolow:

Q. I am asking Mr. Markowitz. A. Yes.

Q. Was Mr. Horner a friend of yours from school? A. I like to think of him as a friend.

Q. Was there a time when Mr. Horner was in the Department of Justice? A. Of my own personal knowledge I don't know this. I have been told this. And, the reason I say this: when I went down to where his office was supposed to have been the gentleman whom I spoke to said that he had in fact been there, but I had never met him. The only time I had seen Bob after graduation from law school is when he was clerking for Chief Justice Warren.

Q. Didn't you tell me on the telephone, Mr. Markowitz, that you had in fact met with Mr. Horner in the Department of Justice? A. No. No. What I had indicated to you, I [29] believe, Mr. Sokolow, was that if you wanted to check the date when I was down at the Federal Trade Commission, that one way you could possibly do so would be to contact Mr. Horner and find out when he left the Government service, because this was within approximately two weeks or so——

Deposition of L. H. Markowitz in Record Club of America, Inc. v. Columbia Broadcasting System, Inc. et al., United States District Court, Eastern District of Pennsylvania

Q. Before he left? A. After he left.

Q. After he left? A. He was not there.

Q. If I advise you, Mr. Markowitz, that Mr. Horner left the Department of Justice on January 30 or January 31, 1965, would that refresh your recollection as to the date of this meeting with Mr. Needleman and Mr. Levine; if that premise were correct? A. If the premise were correct, it possibly—it might or might not, it is hard to say, because I don't know when Bob actually left. I only know what someone told me when he left.

Q. I am asking you to assume, which may or may not be the fact, but for the purpose of this next question I ask you to assume that he left the Department of Justice on January 30 or January 31, 1965, and you know where he went from there, don't you? [30] A. He went to a Cleveland law firm.

Q. Correct. On the assumption that he left the Department of Justice on January 30 or January 31, 1965, what was the date of that meeting?

Mr. Shuman: Mr. Markowitz has already made it clear that the meeting apparently occurred—he told you this already on the record, Mr. Sokolow—it might have been two weeks before or after the time he left.

By Mr. Sokolow:

Q. Is that correct, Mr. Markowitz? I am just trying to clarify it. I think there is a problem.

Mr. Shuman: That is the answer he has given you.

The Witness: My best recollection is that it was within this period of time when someone said he had left. Now, whether that was in January or

Deposition of L. H. Markowitz in Record Club of America, Inc. v. Columbia Broadcasting System, Inc. et al., United States District Court, Eastern District of Pennsylvania

whether it was in May or June or what have you. I don't know. But the person I spoke to at the Department of Justice—and I don't know the gentleman's name—said Mr. Horner had left approximately two weeks ago. So, if his leaving date [31] was correct, if the gentleman's information was correct that he in fact left two weeks ago, and if your information is correct I would assume that this would be the time that there would have been a meeting. But, do I have an independent recollection of it; absolutely none.

Q. Did you write a letter dated June 25, 1969 in which you stated that you and Mr. Freedman visited Mr. Needleman and Mr. Levine at the Federal Trade Commission within sixty days after the initial decision? That is FTC Docket 8512. A. Yes.

Q. You did write such a letter? A. Yes.

* * *

[91] Q. You said that you found a memorandum; is that right? A. On the meeting with the Federal Trade Commission. I of course found other memoranda dealing with meetings we held with other people, but that I assume is not what you are interested in under your subpoena.

Q. Would you identify that memorandum for us in terms of what it looks like? A. It is a two-page handwritten memorandum with very poor, illegible handwriting which I can only identify as my own. It was my notes of a meeting with Mr. Mahafey of the Department of Justice and with the Messrs. Needleman and Levine of the Federal Trade Commission. It is an undated memorandum, but these are notes that I do recall taking at the time of the [92] meeting and they were made extemporaneously with the discussions I had with the gentlemen that I just named.

Deposition of L. H. Markowitz in Record Club of America, Inc. v. Columbia Broadcasting System, Inc. et al., United States District Court, Eastern District of Pennsylvania

Q. Was the meeting with Mr. Mahafey on the same day as the meeting with the Federal Trade Commission people? A. It was.

Q. Did you go directly from Mr. Mahafey's office over to see Mr. Needleman and Mr. Levine? A. We may have had lunch in between but I don't recall. But insofar as dealing with representatives of the United States Government, it would have been from his office to the Federal Trade Commission.

* * *

[93] *By Mr. Sokolow:*

Q. I know. You have just testified that you went directly from the meeting with Mr. Mahafey to the Federal Trade Commission to see Mr. Needleman and Mr. Levine but you may have had lunch; is that correct? A. Right.

Q. Was the meeting that you had with Mr. Mahafey the meeting that you referred to earlier when you testified that you went to the Department of Justice to see Mr. Horner and Mr. Horner was not there? A. We went to the main building of the Department of Justice to look for Mr. Horner. Mr. Horner of course, was not there. The gentleman said to go over to another building and it was across the street. It was a temporary building and I forget what floor it was. That is where Mr. Mahafey was. They are not in the same building, no.

Q. But it was on the occasion that you went to see Mr. Horner? [94] A. Yes, sir.

Q. It was that occasion that you in fact saw Mr. Mahafey? A. Right.

Q. And, following Mr. Mahafey you went directly to the Federal Trade Commission, except you may have had lunch; is that correct? A. That is right.

* * *

Deposition of L. H. Markowitz in Record Club of America, Inc. v. Columbia Broadcasting System, Inc. et al., United States District Court, Eastern District of Pennsylvania

Philadelphia, Pa.
October 30, 1969

[129] *By Mr. Sokolow:*

Q. I show you CBS Exhibit 30 for identification and ask [130] you if that was a document taken from the files which you have produced pursuant to the subpoena. A. Yes, sir.

Q. Now, whose handwriting is on the top of that article? A. In pencil, that is my handwriting.

Q. And what does the handwriting say? A. It says Sig and Fred, for your information, Lew 10-14-64.

Q. And the "Sig" that's referred to is Sigmund Friedman, the president of the Record Club of America; is that correct? A. Yes, sir.

Q. And the Fred referred to is the Fred Miller, the Executive Vice-President of the Record Club of America? A. Yes, sir.

Q. And the article deals, does it not, with the decision of the hearing officer dismissing the complaint in the Federal Trade Commission action against CBS? A. That is correct.

Q. And did that article come to your attention on or about the date shown on that exhibit? A. It did.

Q. Are you familiar with the publication known as BILLBOARD? A. I am.

Q. What is BILLBOARD? [131] A. BILLBOARD is generally regarded as the trade magazine of the recording industry, as well as it also has sections on vending machines, coin-operated vending machines.

Q. During the time when you served as counsel and as Secretary and as a Director of Record Club of America did you read BILLBOARD magazine? A. I did.

Deposition of L. H. Markowitz in Record Club of America, Inc. v. Columbia Broadcasting System, Inc. et al., United States District Court, Eastern District of Pennsylvania

Mr. Sokolow: I ask that the front page of an issue of BILLBOARD dated October 24, 1964 be marked as CBS Markowitz Exhibit 31 for identification.

(Front page of BILLBOARD, October 24, 1964, was marked CBS Markowitz Exhibit No. 31 for identification.)

Mr. Toll: Is there an indication of the precise file from which Exhibit 30 was drawn?

By Mr. Sokolow:

Q. Do you know from precisely what file it was drawn? A. It was drawn from the Record Club of America general files for the years 1962 through 1966, basically, a part of the general file.

Mr. Toll: O.K.

The Witness: In 1966, so that you may understand, Mr. Toll, we started keeping Record Club general files on an annual basis and we had it for '66 and '67.

Mr. Toll: I see.

[132] *By Mr. Sokolow*:

Q. Now CBS Exhibit 31 for identification is dated October 24, 1964.

Are you aware of the fact, Mr. Markowitz, that BILLBOARD subscribers receive their copies approximately a week prior to the date that shows on the particular issue? A. I'd say that's generally correct, yes.

Q. CBS Markowitz Exhibit 31 has a headline reading as follows:

FTC Examiner rules for Columbia Club.

Deposition of L. H. Markowitz in Record Club of America, Inc. v. Columbia Broadcasting System, Inc. et al., United States District Court, Eastern District of Pennsylvania

I ask you whether or not that issue of BILLBOARD came to your attention in the regular course. A. It did.

Q. Now, after you read the article in BILLBOARD and the article in THE WALL STREET JOURNAL——

Mr. Toll: May I see that, if you are finished with it?

Thank you.

Mr. Sokolow: May I have the record thus far?

(The reporter read the pending question, as follows:)

"Q. Now, after you read the article in BILLBOARD and the article in THE WALL STREET JOURNAL——"

[133] *By Mr. Sokolow:*

Q. —did you discuss with Friedman the possibility of going down to talk to representatives of the Department of Justice? A. We did.

Q. Now you testified at the last session, Mr. Markowitz, concerning a visit that you had at the Department of Justice which was followed by a visit with Messrs. Needleman and Levine. Do you recall having so testified? A. I recall, yes, sir.

Q. Now bearing in mind the dates of CBS Exhibits 30 and 31 which you have just seen today, where would you place this meeting in point of time? A. I would place it within 60 to 90 days of the date of these articles.

Q. And when you went in and saw Messrs. Needleman and Levine, can you describe where they were sitting at this meeting? A. Well, we went into their office. The shades or curtains were drawn. I remember it was somewhat dark there and one of the gentlemen, I don't remember whether it

was Needleman or Levine, stretched out on a couch apparently taking a nap. The other gentleman was present in a chair.

There was a young lady present also who left [134] as we began to discuss our business with Mr. Needleman and Mr. Levine.

Q. Now did Mr. Needleman or Mr. Levine say anything to you with respect to the decision of the hearing examiner? A. They had quite a bit to say.

Q. Tell us what you can that they said on that subject. A. I don't know that I can specifically recall their exact language. Time obviously has had its effect, but I recall the impression that I had of it.

The gist of the conversation was that they were completely shocked by the hearing examiner's decision. As you will recall, the decision was extremely critical of trial counsel's handling of the case and, of course, they had the natural reaction, I believe, of any lawyer of getting a slap on the wrist from a hearing examiner. They were somewhat upset and disturbed.

I think they were more or less devastated by the complete rejection of the contentions of the Trial Division of the FTC in this case.

They were interested in what we had to say and indicated to us the course of action that they felt we should follow.

As far as the exact language, word for word, I just can't——

[135] Q. But you have given me the best summary of it that you can? A. This is, I think, an accurate summary of it.

Q. Did they discuss the possibility of taking an appeal? A. They at that time—it wasn't a possibility. It was either

a fait accompli in terms that an appeal was filed or they were going to file one. There was no discussion about the filing of an appeal as such.

What they did discuss with us was the intervention of Record Club of America into the case on our motion. They directed us to one of the Federal Trade Commission's Rules of Practice, and I believe it was Rule 12, but I am not certain.

If you had a copy of the rules I could pinpoint it with accuracy, I believe, and they said that we should petition to intervene under this particular rule.

We discussed with Mr. Needleman and Mr. Levine their theory of the case. We learned that their theory of the case was that they wanted to set aside all licensing agreements, both exclusive and non-exclusive.

We were not interested in going that far. Our object was to try and get rid of exclusive licensing provisions and subsequently we made a decision not to intervene.

[136] We, of course, said that if they would petition to open the record we would be willing to come down and testify and Mr. Friedman indicated he would testify and felt that he could get Mr. Miller to come down and several other officers of the Record Club.

Q. But it was clear from the context of your discussion, was it not, that their appeal had not yet been heard by the Federal Trade Commission? A. Yes.

Q. It had not been heard? A. It had not been heard.

Q. Now in the course of the conversation did you or Mr. Friedman have any occasion to tell Mr. Needleman and Mr. Levine anything about the history of RCOA? A. Yes. I believe Mr. Friedman indicated how he started the record club in his room at Brown University under the name then of the College Record Club; that subsequent to

his leaving Brown he came to York and I believe started as a sole proprietorship.

In 1961, I believe it was in November, we incorporated Record Club of America, Inc. and at that time the shareholders were——

Mr. Toll: Excuse me.

[137] *By Mr. Toll*:

Q. Is what you are now testifying to what you told these men? A. Yes, yes.

Q. Go ahead. A. And it was incorporated with Mr. Friedman and Mr. Miller as the principal shareholders and he detailed for them what was the remarkable growth of the Record Club from, obviously, its small beginnings up until that present time.

I believe he indicated that in our estimation Record Club of America was the fourth, if not the third, but at least the fourth largest record club in existence. We knew that Columbia was bigger, we knew that Capitol was bigger, we weren't sure whether we were larger than RCA or not.

By Mr. Sokolow:

Q. I take it that you told them what the membership of the club was? A. I believe we indicated in general terms what it was, yes.

Q. And did you also discuss, in discussing the progress, approximately what the sales of the corporation were? A. I don't believe we discussed sales volume, no.

Q. But you did discuss your comparative size? [138] A. We discussed comparative size. Mr. Friedman was very reluctant to let sales information out for obvious reasons.

Q. Did Mr. Needleman and Mr. Levine indicate that the Federal Trade Commission had any knowledge of the

existence of RCOA? A. When we told them, they said to us, "Where were you when we needed you? We never heard of you."

It was our turn then to be crushed because we had spent quite a sum of money on advertising and we couldn't conceive that they hadn't heard of us; but, obviously, they hadn't.

Q. Well, had, in fact, the Federal Trade Commission, to your knowledge, heard of the existence of Record Club of America before this meeting? A. Unfortunately, the Bureau of Industry Guidance was aware of us. We had several ads that were questioned by them.

I had had meetings with Mr. Forsch, Joseph Forsch, F-o-r-s-c-h, at the Bureau of Industry Guidance, relative to some advertising problems that we had had, and I just talked to him on the phone.

I am sure the Bureau of Industry Guidance was aware——

By Mr. Toll:

[139] Q. Within the FTC? A. Within the FTC, yes, sir.

Q. Were you by that statement including the Trial Division and the Appeals Division? A. I have no idea as to the knowledge of the Trial Division. My first contact with the Trial Division, Mr. Toll, was that day when I met with Mr. Needleman and Mr. Levine.

By Mr. Sokolow:

Q. But you have testified that prior to that meeting with Mr. Needleman and Mr. Levine, Mr. Forsch and others in the FTC Bureau of Industry Guidance were familiar with the existence of Record Club of America? A. Yes.

* * *

Letter from Markowitz to Wald, Harkrader & Rockefeller

June 25, 1969

Wald, Harkrader & Rockefeller
1225 Nineteenth Street, N.W.
Washington, D. C. 20036

ATTENTION: Edwin S. Rockefeller, Esquire

Re: Record Club of America, Inc.
Columbia Records

Dear Ed:

Pursuant to your request and that of the counsel for Columbia Records, I have attempted to determine the precise date that Mr. Friedman and I went to Washington to visit the FTC in regard to the Columbia Records case.

My best recollection of the time was that it was within sixty days after the hearing examiner handed down his decision in this matter. The reason I place it within this time period was because of the fact that Mr. Neilman [sic] and Mr. Lavene [sic], who were trial counsel for the FTC in that case, were still in a mild state of shock from the severity of the Hearing Examiner's comment on their conduct of the case.

I wish to make crystal clear that I am not absolutely certain of this time, although I feel that my recollection is reasonably accurate and I would state that I am reasonably certain concerning the time.

As you know I did a great deal of work for Record Club since its founding and I have numerous files which I would have to search in an effort to locate my memo concerning

that particular visit. My diaries are kept with the dead files and this would necessitate spending several hours reviewing files and material in an effort to locate the precise time.

I believe you could easily verify the exact date if you would check with the Office of Information of the Federal Trade Commission. At the same time Mr. Friedman and I visited with counsel in the Columbia Record case, we stopped in the office and filled out cards to have our names added to the public mailing list concerning that case. I trust this is the information you require and that you will find it helpful.

With kindest personal regards, I am

Very truly yours,

Lewis H. Markowitz
for
MARKOWITZ, KAGEN & GRIFFITH

LHM/et
cc: Mr. Sigmund Friedman

RX 428

In the Matter of

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.,
DOCKET NO. 8512

Per Cent[1] of Total Record Dollar Sales
in Retail Stores Surveyed by *Billboard's* "Continuing Study of Phonograph Record Sales in U. S. Retail Stores"
Columbia, RCA-Victor, Capitol and All Others
1957-1962

Year	Per Cent of Total Retail Dollar Sales	
	Columbia, RCA-Victor and Capitol	All Others
		100.0%-(1)
	(1)	(2)
1957[2]	43.3%	56.7%
1958	43.6	56.4
1959	44.5	55.5
1960	41.6	58.4
1961	39.6	60.4
1962	37.8	62.2

[1]Includes subsidiary labels.

[2]Last 28 weeks only.

SOURCE: 1957 through 1960 and 1962, The Billboard Publishing Co., "Continuing Study of Phonograph Record Sales in U. S. Retail Stores"; 1961, CX 244A—244Z-70.

RX 311

SHARE OF MARKET – LABEL ANALYSIS – RETAIL STORE SALE ONLY

TOTAL LP

DOLLAR SALES

DOES NOT INCLUDE RACK, CLUB OR JUKE BOX SALES.

LABEL		PERIOD 1	PERIOD 2	PERIOD 3	PERIOD 4	PERIOD 5	PERIOD 6	PERIOD 7	PERIOD 8	PERIOD 9	PERIOD 10	PERIOD 11	PERIOD 12	PERIOD 13
COLUMBIA	CURRENT	14	16	15	17	19	18	15	15	19	18	17	16	17
COLUMBIA	YEAR-TO-DATE		15	15	16	16	16	16	16	16	16	17	16	16
R C A VICTOR	CURRENT	13	14	14	16	14	13	12	12	13	13	11	11	12
R C A VICTOR	YEAR-TO-DATE		14	14	14	14	14	14	14	13	13	13	13	13
CAPITOL	CURRENT	12	12	11	13	11	10	10	15	11	12	10	8	9
CAPITOL	YEAR-TO-DATE		12	12	12	12	11	11	12	12	12	12	11	11
CADENCE	CURRENT							8	/	/	8	/	16	13
CADENCE	YEAR-TO-DATE							/	/	/	/	/	2	4
DECCA	CURRENT	3	4	4	4	4	3	5	2	3	4	3	3	3
DECCA	YEAR-TO-DATE		4	4	4	4	4	4	4	4	4	4	4	4
LONDON	CURRENT	3	3	3	3	2	5	4	3	2	2	3	2	3
LONDON	YEAR-TO-DATE		3	3	3	3	3	3	3	3	3	3	3	3
WARNER BROS	CURRENT	1	1	1	1	1	2	1	3	4	5	6	6	4
WARNER BROS	YEAR-TO-DATE		1	1	1	1	1	1	1	1	2	2	3	3
MERCURY	CURRENT	3	2	2	2	1	3	3	2	1	2	2	1	1
MERCURY	YEAR-TO-DATE		3	3	3	2	3	3	3	2	2	2	2	2
ABC PARAMOUNT	CURRENT		1	1	1	3	3	2	3	3	2	2	1	1
ABC PARAMOUNT	YEAR-TO-DATE			1	1	1	1	1	2	2	2	2	2	2
DOT	CURRENT	2	2	1	3	3	2	1	1	1	1	1	2	1
DOT	YEAR-TO-DATE		2	2	2	2	2	2	2	2	2	2	2	2
M G M	CURRENT	2	2	2	2	1	1	2	3	2	2	2	1	1
M G M	YEAR-TO-DATE		2	2	2	2	2	2	2	2	2	2	2	2
ANGEL	CURRENT	1	1	2	1	1	2	1	1	2	1	3	1	1
ANGEL	YEAR-TO-DATE		1	1	1	1	1	1	1	1	1	1	1	1
KAPP	CURRENT	1	1	2	2	1	1		1	1	1	1		1
KAPP	YEAR-TO-DATE		1	1	1	1	1	1	1	1	1	1	1	1
VERVE	CURRENT	1	1	1	1	1	1	1	1	2	2	2	1	1
VERVE	YEAR-TO-DATE		1	1	1	1	1	1	1	1	1	1	1	1
LIBERTY	CURRENT		1	2	1	1	1	1	1	1	1	1	1	1
LIBERTY	YEAR-TO-DATE		1	1	1	1	1	1	1	1	1	1	1	1
COMMAND	CURRENT	1	1	1	2	1	1			1			1	
COMMAND	YEAR-TO-DATE		1	1	1	1	1	1	1	1	1	1	1	1
UNITED ARTISTS	CURRENT	1	1	1	1	2	1	1	1	1	1	1		
UNITED ARTISTS	YEAR-TO-DATE		1	1	1	1	1	1	1	1	1	1	1	1
PARKWAY	CURRENT	2	1	1	2	1			/		/			
PARKWAY	YEAR-TO-DATE		2	2	2	1	1	1	1	1	1	1	1	1
REPRISE	CURRENT		1		1	/				1				1
REPRISE	YEAR-TO-DATE		1	1	1	1	1		1	1	1	1	1	1
ATLANTIC	CURRENT	1		1	1	1		1		1				/
ATLANTIC	YEAR-TO-DATE			1	1	1	1	1	1	1	1	1	1	1

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/= Less Than 1 Half of 1 Percent.

RECORD MARKET RESEARCH DIV.

FIGURES ABOVE ARE SHARE OF MARKET PERCENTAGES

SHARE OF MARKET – LABEL ANALYSIS – RETAIL STORE SALE ONLY

TOTAL LP

DOLLAR SALES

DOES NOT INCLUDE RACK, CLUB OR JUKE BOX SALES.

LABEL		PERIOD 1	PERIOD 2	PERIOD 3	PERIOD 4	PERIOD 5	PERIOD 6	PERIOD 7	PERIOD 8	PERIOD 9	PERIOD 10	PERIOD 11	PERIOD 12	PERIOD 13
EPIC	CURRENT	6	9	5	/	8	12	11	16	11	13	9	5	5
EPIC	YEAR-TO-DATE		7	6	6	6	7	8	9	9	9	9	9	8
ROULETTE	CURRENT	14	17	7	13	16	8	6	7	/	5	7	/	5
ROULETTE	YEAR-TO-DATE		15	13	13	13	12	12	11	10	10	9	9	8
VANGUARD	CURRENT	10	6	/	/	9	7	5	7	6	13	14	6	8
VANGUARD	YEAR-TO-DATE		8	7	6	6	7	6	6	7	7	8	8	8
CORAL	CURRENT	7	12	7	9	5	8	6	9	7	7	5	5	7
CORAL	YEAR-TO-DATE		9	9	9	8	8	8	8	8	8	8	7	7
ATCO	CURRENT					12	11	9	8	/	6	7	6	5
ATCO	YEAR-TO-DATE					/	5	5	6	5	5	5	6	6
CHESS	CURRENT	8	/	5	/	/	/	21	11	13	13	8	/	/
CHESS	YEAR-TO-DATE		5	5	5	5	/	6	7	7	8	8	7	6
JUBILEE	CURRENT	8	9	10	/	/	/	6	6	7	10	9	5	/
JUBILEE	YEAR-TO-DATE		9	9	8	7	6	6	6	6	7	7	7	6
AUDIO FIDELITY	CURRENT	8	5	5	/	/	9	/	9	/	/	7	/	5
AUDIO FIDELITY	YEAR-TO-DATE		7	6	5	5	6	5	6	6	5	5	5	5
CAMDEN	CURRENT	6	6	7	/	5	5	/	/	5	/	/	6	/
CAMDEN	YEAR-TO-DATE		6	6	5	5	5	5	5	5	5	5	5	5
IMPERIAL	CURRENT	5	8	6	7	13	5	6	5	/	5	6	/	/
IMPERIAL	YEAR-TO-DATE		6	6	6	7	7	7	6	6	6	6	6	5
STEREO FIDELTY	CURRENT			5	10	/	6	/	6	5	/	/	/	/
STEREO FIDELTY	YEAR-TO-DATE			/	5	5	5	5	5	5	5	5	/	/
BLUE NOTE	CURRENT			8	/	6	5	/	/	5	/	/	/	/
BLUE NOTE	YEAR-TO-DATE			5	5	5	5	5	5	5	5	/	/	/
ARGO	CURRENT	9	/	7	/	/	/	/	/	/	5	/	/	/
ARGO	YEAR-TO-DATE		5	6	5	5	5	5	/	/	/	/	/	/
KING	CURRENT		7	9	/	/	/	/	/	/	/	/	/	/
KING	YEAR-TO-DATE		6	7	5	5	5	5	/	/	/	/	/	/
VEE JAY	CURRENT	6	/	8	/	/	/	/	/	/	6	6	/	5
VEE JAY	YEAR-TO-DATE		5	6	5	5	/	/	/	/	/	/	/	/
PRESTIGE	CURRENT	5	/	7	/	5	/	/	/	/	/	/	/	/
PRESTIGE	YEAR-TO-DATE		/	5	/	/	/	/	/	/	/	/	/	/
LAURIE	CURRENT		6	/	/	/	/	5	/	/	/	/	/	/
LAURIE	YEAR-TO-DATE		5	/	/	/	/	/	/	/	/	/	/	/
RIVERSIDE	CUPRENT	5	/	/	/	/	/	/	/	/	6	/	/	/
RIVERSIDE	YEAR-TO-DATE		5	/	/	/	/	/	/	/	/	/	/	/
ELEKTRA	CURRENT	5	/	/	/	/	/	5	/	5	/	/	/	/
ELEKTRA	YEAR-TO-DATE		/	/	/	/	/	/	/	/	/	/	/	/
ORIGINAL SOUND	CURRENT			5	/	/	/	/	/	5	/	/	/	/
ORIGINAL SOUND	YEAR-TO-DATE			/	/	/	/	/	/	/	/	/	/	/

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RECORD MARKET RESEARCH DIV.

PAGE NO. 4B

FIGURES ABOVE ARE SHARE OF MARKET PERCENTAGES

Conclusions, Argument, Proposed Order, Vol. II, p. 337

* * *

The weakening of the independent record dealer caused by the Club, and aggravated by the Licensing Agreements, works to deprive independent manufacturers of adequate channels of distribution (Findings 403-404). The cumulative effect of Licensing is to encourge others to join in (Findings 401-402). With their basic channel of distribution in jeopardy, these independents must inevitably, if the effect of Licensing is extended, look to clubs for distribution (Finding 405). As previously indicated, with the elimination of independent record clubs, the independents will each have to cluster around one of their Big Three integrated competitors for adequate distribution. The application of leverage on the manufacturing level down to distributive levels will thus eventually give respondents even additional power on the manufacturing level.

APPENDIX A—DEALER TESTIMONY

(1) Name	Sales or Profits[1] (2)	(3) Effect of Club	(4) Licensing: Aggravated Effect of Club
Rothstein (Mrs.) (St. Joseph, Missouri)	1961: $77,474 1962: 76,391 (3287)[2]	Cannot compete with the Club in price of initial offers or subsequent offers (3299).	Dealer finds it "impossible to compete with Club prices in sale of Licensors' records" (3299-3300, 3303).
	* * *	* * *	* * *
	Dealer testified she has not participated in growth of industry (3288).	Early effect of Club, before Licensing, was to reduce classical business from 20% to 3% of total. Classical customer represented a particularly desirable business (3304-05); "... there isn't much more they can take away. That 2 or 3% represents probably what we sell at peak gift seasons" (3330).	Sales of Licensors' records by the Club has had an adverse effect on dealers' pop business (3306-07, 3299).
		* * *	* * *
		"We don't think that record manufacturers should be in competition with their dealers.	Club is most serious source of injury to this dealer's business and addition of outside labels means: "We still suffer in the classical field, but now it's really hurting pretty bad in the pop field which is pretty serious" (3309).
			* * *

[1]Entries in this column appear only when comparative record figures or profit statements are in the transcript. Entries are sales unless contrary indicated.

[2]Number references are to transcript pages for witness in column 1.

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Rothstein (Mrs.)		We have helped them all through the years, exploit and show their products and help them build up a business. And why should they turn around and put a knife in our back?" (3318).	". . . bringing in of the other labels is sort of like a giant octopus, it is going to encompass our entire business if it keeps up. We won't have anything we can sell that is from the Club" (3331). * * * ". . . if this thing just keeps going on and on and on, it is going to drive all of us poor little dealers out of business, the people will be forced to buy from a huge combine, and then they will have the price, and that will take care of that" (3332).
Collins (30 stores in Michigan and Ohio)	1960: $550,000 1961: 500,000 (2975)	A retailer, formerly employed by Columbia and knowledgeable in the purpose and effect of Club advertising, testified that the main emphasis of the Columbia ads is to attract attention to the offer of 6 records at $1.99. He stated that the focal point of the ad was the	The effect of the offer of Licensors' records ". . . it's just adding more fuel to the fire. More artists, [against] which we are unable to compete" (2990).

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Collins		introductory offer and he doubted that the consumer ". . . will ever go to the trouble of extending the price of $2.15 or $2.16, whatever it averages out to be" (2987; 2986-88). * * * ". . . if [customers] are buying records from the Columbia Record Club, they don't come into the store in the first place" (3018). * * * The effect of the Club has been a loss of business to this chain, and the establishment of a price which the dealer cannot meet; he testified: "You can't see a man who doesn't come in, but you can see your dusiness decline, and you assume that if records are being offered at a lower price and over a period of time that it must be a successful operation, or drawing	

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Collins		from some consumer level, and we assume, since we cover a large section of Michigan, or all of Michigan, that we are included in this withdrawal. We also assume that once a price image is established, that with the effectiveness of advertising today that this is a difficult thing to combat" (2984-85). * * * "It isn't the idea of a Club or mail order that is diffiicult to swallow, but it is the idea of a non-competitive price. A price that is beyond our reach" (2991). * * * This witness testified that the consumer has received a "short range benefit" from offers of clubs (3004-05). If the consumer saves "a dollar or two" the following also occurs: ". . . a long range projection	

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Collins		of this thing [Club] is to the detriment of the industry as a whole, and this will eventually result in less choice and less variety to the consumer" (3030). "If you drive out independent dealers and independent imagination you [will be] in a mass market and . . . a great many buyers will suffer . . ." (3030).	
F. Hartstone (Boston & environs)	Volume in 1962 for three Boston area stores lower than in 1961 (1823).	Cannot compete with Club in price (1776). * * * Offer or records at six for $1.89 or six for $2.37 is a loss leader (1823).	Referring to CX 113: ". . . it makes the price—any price you ask for a classical record, for one of these records that you have here, indefensible. If we are asking $4.19 for the Mercury 1812 Overture in our store, and he can get that and five others for $1.89 in the Club, we are somewhat of a disadvantage. I would say more than somewhat." * * * ". . . the fact that non-Columbia Records are offered and the

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
F. Hartstone			number of labels which are offered on the records, takes away any limiting effect to the consumer that he can only get the Columbia records through a club. The fact of the matter is today I think a consumer thinks he can get every record made from a club at reduced prices. Doesn't matter what label it is on. They are available through the Club. The cream of the catalogs are all in the clubs" (1777).
Hyman (Philadelphia)	Sales "slightly higher" in 1962 than 1961 (2354). * * * No profit in 1961 on $60,000 volume (2345).	Cannot compete with the Club in price. (2350)	Offered consumers Licensors' records at $2.98; was told ". . . [by consumer] that they could get that plus five others at $1.99 why should they pay me $2.98" (2351).
H. R. Smith (Philadelphia)	1961: $119,822 1962: 124,606 No profit in either year (2149).	Dealer who operates a mail order business testified that on the basis of his purchase price he is not able to sell records at an average price of $2.37 or at a price of 6 for $1.98. (2157-61, 2179).	Dealer's volume of business adversely affected by inability to match Club prices for Licensors' records (2161).

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Rossi (Philadelphia)	1961: $69,000 1962: 64,000 (2273)	Cannot compete with the Club in price (2281).	Sale of Licensors' records as part of initial offer "destroyed the saleability" of the record offered and others by the same artists (2284).
Wilf (Philadelphia)	1961: $169,000 1962: 124,000	Q. Can you compete with Columbia Record Club in price? A. No, I cannot. Q. Can you stay in business and sell records at . . . average price of $2.37? * * * A. I am having a difficult time staying in business at $2.88. (2702)	Offer of Licensors' records has decreased sales (2703). Q. Can you compete with the Columbia Record Club and the price at which they sell records other than Columbia and Epic? * * * A. No, I cannot. (2702) * * * The offer of records by the Club on such labels as Cameo-Parkway and Kapp has a two-fold effect on dealer: (1) forces dealer to drop prices to a point where he realizes no profit; and (2) makes operation at lower margin difficult because of loss of volume. (2711-12). * * *

Name	Sale: or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Wilf			"About the only way that we can [compete with the Club] is through a product that they do not handle." Offer of Licensors' products adversely affects last way dealer can compete with Club (2710).
			* * *
			This dealer further stated the effect of offer of Licensors' records as follows: ". . . the Cherubini Medea is not available on any label in the catalog today other than on Mercury. This product is now being sold to the Columbia Record Club. This is what I call a T O or a take-over. In other words, here is Mercury selling a particular product to a competitor who in turn is selling to the general public, and completely circumventing the dealer. And the dealer has no recourse as far as this product is concerned. He has it on his shelves. He has

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Wilf			bought it, stocked it, paid for it, is displaying it, advertising it . . . the retailer just has to sit on his haunches and wait for that particular customer to come in" (2708). * * * Dealer testified that his ability to compete with Club is diminished as other labels are added (2710).
Rubinstein (Paoli, Penn.)	Record sales were higher in 1960 than in 1961 (2185).	Cannot compete with Club in price (2197). * * * "The fact that Columbia has an artist under contract, that artist could only record for Columbia, and therefore when the demand was created for that record, through radio, the public wanted to buy that record, it would not accept any substitute. And we had to buy our records directly from Columbia, who	Cannot compete with Club in price at which Club offers Mercury, Kapp, Warner Bros., Verve, and Liberty (2197-98).

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Rubinstein		was competing with us for the very same consumer who came into my store to buy the record" (2239). * * * Effect of Club has been to take ". . . a great many of our customers out of our store that normally used to come in. I know that is a fact" (2199).	
Hollander (Chicago)	1960: $36,065 1961: 25,157 (3090)	Dealer names specific customers lost to the Columbia Record Club. (3102).	Dealer testified that he ". . . cannot sell them [Licensors' Records] in competition against the Columbia Record Club" (3106). * * * Dealer is faced with extinction if "cream" records on all labels are offered by Club (3147).
Schaps (Hillside, Illinois)	1961: $126,000 1962: 130,000 Increase of $4,000 broken down as follows:	Cannot compete with the Club in price (3263); Club was one of the factors which forced this dealer to sell his first store.	Cannot compete with the offers of Licensors' product by the Club (3263). * * *

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Schaps	$3,000 due to collection of sales tax, $1,000 from increase in non-record business (3253-3254).	(3246-47). About his second attempt to survive in the record business, he said, ". . . I can meet the competition of a so-called discounter head-on and every day, and I can compete for them on the same basis that they sell. I also am a merchant. Now, with the Club, I cannot do any such thing. I can't—the price offering that they have is competely out of the question for any retailer to offer; secondly, I cannot even see the market. I do not even see the market that they sell to, because they never come to my store. I never get a crack at them. Let us put it that way" (3267). * * * ". . . the over-all effect of this Club operation has been and will continue to make not available to the consumer the services and facets of the in-	Addition of outside labels in the last few years "have become a tremendous factor" in the Club (3379). * * * "The effect of broadening the Columbia Club to include other labels has made it seem like anything would become available to the club so, in effect, what it has done, it has broadened the competitive market available to the club to include almost all of my customers, the whole complex of my customers are now potential club members, where before you might eliminate a good part of my potential customers, anyway" (3258).

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Schaps		dependent record dealer, and in the long run it will be quite injurious" (3374).	
Freedman (Philadelphia)	Sales declined in each of the years 1960, 1961 and 1962 (2584).	". . . there have been instances where customers have come in and asked for items, when they find it is an item that would be available or it is available on the Columbia Record Club they will ask you a quotation of price and tell you they can buy it cheaper at the club and turn around and walk out, which means a lost customer—the customer is not going to come back again. These are some concrete cases which I can remember" (2589).	Effect of offers of Licensors' products by Club is to depress prices to such an extent that ". . . if prices have to go down much lower, with the profit squeeze and the higher costs, I, for one, will probably have to go out of business" (2606, 2604-07). * * * Dealer testified that offer of additional labels by other clubs besides Columbia would have cumulative adverse effect on his business. (2607).
Winograd (Chicago)	1961: $74,000 1962: 86,000 increase in business attributed to singles not sold through Club (3080).	Cannot compete with the Club price of 6 for $1.99 or with the composite price of 12 records (3037). * * *	Cannot compete with the Club price at which it sells Licensors' records (3040-41). * * *

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Winograd		Effect of Club was to reduce sales of classical records which in turn meant loss of the most desirable type of customer: the steady classical record buyer (3038).	Effect on business more severe from Club than from other clubs because of outside labels (3040).

* * *

Q. In the past, have you been able to compete with the Columbia Record Club in any way? A. Well, we did have, I mean the one weapon that we have had, that is the one advantage we have had in our business has been diversity, in other words, as I said about the RCA Record Club, the same was true about the Columbia Record Club. If the person was confined to Columbia Records they might in the course of a year might want to buy other records, then we might have same [sic] chance of selling them these other records, but with the Columbia adding other records now and offering anything that seems, seems that al-

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Winograd			most anything that comes along that is good finds its way into the Columbia Record Club, they are taking away this method that we had of competing (3046-47). * * * Diversity is one of the most important factors in bringing people into a record store. "I feel that [the offer of outside labels] h[a]s had an effect, because I can't believe that the drop in sales on some of these things [is] coincidental or due entirely to other causes" (3047). Cites examples (3047, 3048, 3050-51).
Hurst (Mrs.) (Fairview Park, Ohio)	1961: $44,429 1962: 38,331 (3185)	Cannot match the prices of the Columbia Record Club (3234) and remain in business (3241-42). Testified: ". . . It is hard to compete with the Columbia Record Club because it is very hard to fight back. Dealing with other competitors we can	"Now the club represents a greater menace because it handles so many labels other than Columbia, and I think this is one reason that the Columbia Record Club has hurt us more than the others" (3189). * * *

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Hurst (Mrs.)		offer services, and for one thing we can offer personality, too, which in a small business is not a small factor. We make exchanges and otherwise try to treat customers right. With the Columbia Record Club I am afraid we just don't have a chance to contact these customers." (3231) Dealer lost specific customers to Club (3209-10).	Cannot compete with Club offers of Licensors' records (3197). Dealer testified that she had assisted the Club in the formative stage because of representation made by CBS that Club ads would bring customers into the store who would be exposed to the dealer's variety of labels: ". . . it's getting to be something so big that we can't compete with it. One of the benefits of being a dealer was that we have a variety of inventory and when people come into our establishment they are not limited to buying one label as all of Clubs besides the Columbia Record Club originally started as, but now when they see ads for hit albums that they can purchase through the mail, well naturally, we lose some of our impact as a dealer handling a large variety of records." (3192).

* * *

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Hurst (Mrs.)			The adverse effect of the Club has grown as the outside labels are added (3237).
Bialek (Washington, D. C.)		Dealer testified that he cannot match the Club prices for Columbia records. (1369). * * * The effect of Club advertising is to create the impression that the items appearing in the Club ads are "promotional" items which should be sold by retail dealers at the same price as the Club price (1362).	Dealer testified that he cannot match the prices of Club offers of Licensors' records (1368-69).
Metcalfe (Fayetteville, Arkansas)		Cannot compete with the Club in price (2884). Q. Can you stay in business and compete against the Columbia Record Club . . . A. At these prices, no (2970). * * * Classical business is "greatly diminished" due to "adverse effect that the record Club has	This dealer testified as follows about the Club offers of Licensors' records: "If I tried to offer those same prices, I would be out of business" (2895), and ". . . there is no profit there. How could you stay in business? I can't offer those records to my customers at those prices" (2896). * * *

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Metcalfe		on my sales" (2885); the unfair price range offered to members of the Club has reduced classical sales (2904). * * * The unfair price advantage offered by the Club "is my big major problem. I can't compete with their prices" (2968).	About the sale of Licensors' records as part of an introductory offer, this dealer testified ". . . it is not in my business interest to see any artists or any group of artists or records offered by the Columbia Record Club at six for a dollar ninety-nine cents — I can't compete with that price. Furthermore, these artists — the offering of this album by the Columbia Record Club at that price will, I am sure, based on my past experience, will diminish sales of those records in 1963. I can't compete with that; I can't compete with that price." (2888). * * * The offer by the Club of the Licensors' well-known artists reduces the dealer's sale of the artists' records (2889-91); and further affects the dealer's entire business as follows:

Name	Sales or Profits	Effect of Club	Licensing: Aggravated Effect of Club
Metcalfe			"We carry a complete catalog in our store, and the most popular artists are terrific builders in our store, they bring in traffic for other records, for other artists. I can't operate a store without a strong artist for which there is a demand; we can't. The sales of a large, or strong selling artist, popular artist are helpful to other artists as well, other sales" (2891-92).
Levin (Philadelphia)		No competitor except Club offers records at price of six for $1.89 (506); "... [customers] felt that at the prices they were buying the records for [from me] they could buy them cheaper from the record clubs." (463)	Ability to compete with Club further impaired by offer of outside labels (482-84).
Maggid (New York)			Testifying about Club offer of Licensors' records as part of initial offer (CX 105): "... when a price appears that is so substantially—such a sub-

Name	Sales or Profits	Effect of Club	Licensing : Aggravated Effect of Club
Maggid			stantially lower price than we would be offering the record [for] it tends to destroy the price that we are offering the record at. A man may not even buy the record at all. He might not be a member of the Columbia Record Club. In a sense, these things would possibly make a person simply distrust our price or a record as being too high. He would simply read a low price, or read it as a promotional item, come into the store. We say $3.89. His chin drops. How can you charge $3.89 for that record? He saw it in the newspaper the other day at much less. As far as I can tell, this is quite an obvious conclusion that one can draw from this" (843).

Transcript page 5998 line 6 through page 5999 line 24

[5998] Mr. Lavine: Your Honor, I repeat: if these documents are received, there will be nothing in the record to show that any of these companies sold a single record. We don't know what other labels are in these companies or clubs. We don't know what effect these companies or clubs have on other record clubs, assuming these first clubs do exist.

As a matter of fact, I represent to you that Mr. Needelman and I have never heard of a large number of these so-called clubs, other than certain hearsay statements made by witnesses.

Miss Silver put her finger on another problem, your Honor. She referred to the Diner's Club. I respectfully call your Honor's attention to Mr. Bernard Solomon's testimony in California, where he was cross examined for from four to five hours by Mr. Robinowitz, which was not at all improper and which, your Honor, as a matter of fact, graphically illustrates the problem we are having now.

Hearing Examiner Moore: Let me inquire of government counsel, are you raising any question as to the authenticity of these documents being what they purport to be; that [5999] is, advertisements published in the publications listed on the exhibits list?

Mr. Lavine: May I have one moment to confer, your Honor?

Hearing Examiner Moore: Yes.

(Discussion off the record.)

Mr. Lavine: If I define authenticity in the same way your Honor does, the answer to your Honor's question is yes, we do. I refer you to Respondent's Exhibit 192 for identification. We see here a reference to the Music Appreciation Record Club. We don't know what the Music Appreciation Record Club is. We may or may not have

heard that term used by witnesses, but, your Honor, I don't know if this advertisements is an advertisement and we have to question authenticity because of the fact that we don't know anything about the company and we cannot assume, without any other information in the record, that the ad was actually placed.

I attempted to distinguish this type of situation from the RCA Victor Record Club and the Capitol Record Club and the Columbia Record Club about which we have never or rarely questioned authenticity of ads. I submit that we are getting into a very hazy and dangerous area. In good conscience, we cannot assume authenticity about companies we have either never heard of or know very, very little about.

Transcript page 6015 line 8 through line 24

[6015] Mr. Lavine: Your Honor, to answer your question, I will use the example of Respondent's Exhibit 205 for identification, which purports to be a mailing piece from something called the Citadel Record Club. We do concede that something arrived in the hands of Miss M. J. Raitt purporting to come from the Citadel Record Club. We do not concede, your Honor, anything about the Citadel Record Club. We don't know if the Columbia Record Club owns, participates in or is associated with the Citadel Record Club. We don't know if there is such a thing. All we know is that somebody took a mimeograph machine, or a publisher or a stamp and stamped "Citadel Record Club."

We don't even know if an entity called Citadel Record Club exists. There is nothing in this record to show that any such entity is in business or even exists pro forma. All we know is that somebody stamped "Citadel Record Club" on a piece of paper and mailed it to Miss Raitt.